No. 83-601

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN KATSOUGRAKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly admitted into evidence a declaration against interest pursuant to Fed. R. Evid. 804(b)(3).

2. Whether admission of a declaration against interest violated petitioner's Sixth Amendment right to confront witnesses against him.

3. Whether petitioner was entitled to a new trial on the conspiracy count because the court of appeals reversed his convictions on two of the four substantive counts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 715 F.2d 769. A memorandum of decision of the district court denying a motion for a new trial (Pet. App. 19a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1983. The petition for a writ of certiorari was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner and co-defendant John Hiotis were convicted on one count of conspiring to commit mail fraud and to destroy maliciously a business premises by means of an explosive, in violation of

18 U.S.C. 371 (Count 1); one count of aiding and abetting and procuring persons maliciously to damage and destroy a business premises by means of an explosive, in violation of 18 U.S.C. 844(i) (Count 2); two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts 3 and 4); and one count of aiding and abetting and inducing persons to commit a felony (mail fraud) by means of an explosive, in violation of 18 U.S.C. 844(h) (Count 5). Each was sentenced to concurrent terms of five years' imprisonment on Counts 1 and 5 and was given a suspended five-year sentence on Counts 3 and 4 and a suspended 15-year sentence on Count 2. Petitioner and Hiotis also were sentenced to five years' probation, to begin following their terms of imprisonment on Counts 1 and 5. The court of appeals affirmed the convictions on Counts 1, 3 and 4 and reversed the convictions on Counts 2 and 5.

1. The evidence at trial showed (Pet. App. 2a-8a) that from 1979 to 1981 petitioner and co-defendant John Hiotis were co-owners of stock in Mousaka Trading Corporation, a business that owned and operated two New York restaurants, each named "Kings Villa Diner." One of the diners was located in Westbury and the other in Great Neck. The Westbury diner operated at a profit, but the Great Neck diner incurred major losses and owed substantial amounts of taxes to the State Tax Commission, the New York State Unemployment Insurance Division, and the federal government. When petitioner and Hiotis were unable to sell the diner, they decided to burn it.

In July 1981, petitioner and Hiotis asked Steven Karagiannis, a cook at the Westbury diner, whether he knew of anyone who could set fire to the Great Neck diner, but Karagiannis refused to discuss the matter. In September petitioner and Hiotis located two individuals, Kyriakos Chrisanthou and John Kynegos, who were willing to carry

out the arson. According to Chrisanthou's wife, Chrisanthou told her in late September that he and Kynegos were going to be paid $3,000 each to set fire to a diner and showed her a business card bearing the name Kings Villa Diner. Two days before the October 4 fire, Mrs. Chrisanthou drove her husband to Queens where they joined Kynegos in a coffee shop. The three then waited in the Chrisanthous' car for a third person. Petitioner arrived a few minutes later, and Chrisanthou pointed him out and told his wife that the person they were waiting for had arrived. Chrisanthou and Kynegos left the car and told Mrs. Chrisanthou to leave. The next day Chrisanthou told his wife that he had just returned from a diner on Old Country Road (the road on which Kings Villa was located) where he had received an $800 advance. Pet. App. 3a-4a.

On October 4, Chrisanthou and Kynegos entered the diner using a key that petitioner and Hiotis had provided to them. They spread uncontained gasoline throughout the diner and ignited it. Both men were unable to escape and suffered burns that caused their deaths several days later. Pet. App. 3a.

On the day after the fire, Chrisanthou's friend, Fitos Vasiliou, visited him at the Nassau County Medical Center. Since Chrisanthou was almost completely wrapped in bandages, Vasiliou instructed him to answer questions by nodding his head (Tr. 768). Vasiliou first asked Chrisanthou whether petitioner and Hiotis "set him up" and burned him in the diner, and Chrisanthou shook his head in the negative. Vasiliou next asked whether the owners of the diner had paid Chrisanthou to burn it down. Chrisanthou nodded his head affirmatively. Vasiliou subsequently went to the Westbury Kings Villa where he confronted Hiotis and accused him and petitioner of complicity in the arson. Vasiliou threatened to take his story to the police unless petitioner and Hiotis compensated the decedents' families. Thereafter, Hiotis paid Vasiliou $6,000 for his "silence."

2. The court of appeals reversed the convictions on Counts 2 and 5 on the basis of *United States* v. *Gelb*, 700 F.2d 875 (2d Cir. 1983), which held that arson committed by the use of uncontained gasoline is not punishable under 18 U.S.C. 844 (Pet. App. 4a-6a). The court concluded (*id.* at 6a-7a) that the reversal on Counts 2 and 5 did not require reversal on the conspiracy count as well, since one object of the alleged conspiracy — mail fraud — was proved by clear and convincing evidence. The court of appeals also determined (*id.* at 7a-18a) that the trial court had properly admitted Vasiliou's testimony about Chrisanthou's responses and the testimony of Mrs. Chrisanthou about statements her husband had made to her before the arson and had properly excluded questioning by defense counsel that included a reference to Chrisanthou and Kynegos as "hit men."

ARGUMENT

1. Petitioner contends (Pet. 14-16) that the trial court erred in admitting Chrisanthou's hospital bed communications pursuant to Fed. R. Evid. 804(b)(3) without making a specific finding that Vasiliou, the in-court witness, was trustworthy.[1] Petitioner asserts that the decision of the

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[1]Fed. R. Evid. 804(b)(3) provides:

> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> **(3) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

court of appeals conflicts with decisions of the Fifth Circuit[2] on the question whether a court must consider the credibility of the in-court witness before admitting testimony under Rule 804(b)(3). But to the extent such a conflict may exist, both its significance and its relevance to this case are questionable. In any event, the decision of the court of appeals is correct, and further review is therefore unwarranted.

As an initial matter, the premise of petitioner's contention — that the trial court "refused to consider the trustworthiness of the in-court witness" (Pet. 14) — is questionable. During trial, defense counsel did not even suggest that Vasiliou's credibility was of any significance in connection with admission of the testimony or that the court was required to make a finding with respect to Vasiliou's credibility; rather, defense counsel's objections focused on the condition of Chrisanthou at the time he responded to Vasiliou's inquiries. See Tr. 613-634. Thus, petitioner did not give the trial court an opportunity to consider the issue petitioner now characterizes as essential, and it is doubtful that the contention was properly preserved for later review. See Fed. R. Evid. 103(a)(1). Moreover, there is no indication that the trial court did not believe Vasiliou to be credible in connection with this particular testimony;[3] in

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[2] *United States* v. *Alvarez*, 584 F.2d 694 (5th Cir. 1978); *United States* v. *Bagley*, 537 F.2d 162 (5th Cir. 1976), cert. denied, 429 U.S. 1075 (1977).

[3] Petitioner points to two comments made by the trial court concerning Vasiliou (Pet. 16). Those comments are taken out of context, however, and there is no indication that they relate to the testimony about Chrisanthou's responses. Petitioner also suggests (*ibid.*) that the trial court believed that Vasiliou's credibility was irrelevant to the admissibility of Chrisanthou's responses. The portion of the transcript cited for that proposition (Tr. 998) does not make clear whether the trial court was referring to the testimony about Chrisanthou's responses, and it does not indicate that the trial court did not view that testimony as credible.

fact, once petitioner urged the significance of Vasiliou's credibility in a post-trial motion, the trial court articulated its reasons for concluding that the testimony was credible. See Pet. App. 29a-30a.[4] Thus, petitioner's contention probably would not have made a difference to the course of the trial even if it had been properly presented to and ruled on by the trial court.

In any event, the court of appeals correctly concluded that a trial court need not consider the veracity of the in-court witness when considering the admissibility of an out-of-court statement proffered under Rule 804(b)(3).[5] The inquiry properly focuses on the trustworthiness of the declarant, rather than that of the in-court witness. See, *e.g.*, *United States* v. *MacDonald*, 688 F.2d 224, 232-233 (4th Cir. 1982), cert. denied, No. 82-565 (Jan. 10, 1983); *United States* v. *Satterfield*, 572 F.2d 687, 691-692 (9th Cir.), cert. denied, 439 U.S. 840 (1978); *United States* v. *Atkins*, 558

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[4]The court of appeals held (Pet. App. 13a) that the trial court erred in making these findings of fact after the notice of appeal had been filed. But petitioner does not suggest that the trial court's post-trial comments on Vasiliou's credibility were erroneous or that they differed from the court's views during trial.

[5]Petitioner urges that there is a conflict on this issue between the Second and Third Circuits, on the one hand, and the Fifth Circuit, on the other. Those courts agree that corroborating circumstances must indicate the trustworthiness of a statement admitted under Rule 804(b)(3); they differ only on what a party must show in order to establish trustworthiness. The Fifth Circuit has concluded that a court should examine both the probable veracity of the in-court witness and the reliability of the declarant (see *United States* v. *Alvarez*, 584 F.2d at 701), while the Second and Third Circuits take the position that a court need not consider the veracity of the in-court witness before admitting the testimony (see Pet. App. 13a-14a and *United States* v. *Atkins*, 558 F.2d 133, 135 (3d Cir.), cert. denied, 434 U.S. 929 (1977)). At least in the context of this case, where the issue was not adequately preserved, that difference in approach is not of sufficient significance to warrant this Court's attention.

F.2d 133, 135 (3d Cir.), cert. denied, 434 U.S. 929 (1977). "The jury can evaluate the perception, memory, narration, and sincerity of the witness who testifies about the hearsay declaration, and that witness testifies under oath and subject to cross-examination." *United States* v. *Satterfield*, 572 F.2d at 691. See also *United States* v. *Garris*, 616 F.2d 626, 633 (2d Cir.), cert. denied, 447 U.S. 926 (1980); 4 Weinstein & Berger, *Weinstein's Evidence* para. 804(b)(3)[03], at 804-108 to 804-109 (1981).[6]

2. In a related contention, petitioner asserts (Pet. 17-21) that admission of Chrisanthou's communications to Vasiliou violated the Confrontation Clause because the communications were unreliable. That contention lacks merit.

Although they are not precisely congruent, the hearsay rules and the Confrontation Clause generally are designed to protect similar values. See *Dutton* v. *Evans*, 400 U.S. 74, 81-82 (1970) (plurality opinion); *California* v. *Green*, 399 U.S. 149, 155-157 (1970). The underlying purpose of the Confrontation Clause is "to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence * * *." *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980).

In the case of hearsay statements, the Court has focused on the " 'indicia of reliability' " surrounding a statement. See, *e.g.*, *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972);

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[6]Petitioner quotes Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Geo. L. J. 851, 899 (1981), for the proposition that a trial court must find that an out-of-court statement against interest in fact was made before admitting the statement under Rule 804(b)(3). Petitioner takes the quotation out of context. In fact, Professor Tague criticizes the Fifth Circuit approach and concludes that Congress rejected a requirement of proof of the credibility of the in-court witness as a condition of admissibility under Rule 804(b)(3). 69 Geo. L. J. at 901-903, 974.

Dutton v. *Evans*, 400 U.S. at 89. In general, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception" (*Ohio* v. *Roberts*, 448 U.S. at 66). Petitioner concedes (Pet. 18) that in some cases a statement that satisfies the hearsay exception for statements against interest may survive a Confrontation Clause challenge because of the inherent reliability of the statement. Indeed, the courts of appeals have concluded generally that admission of inculpatory declarations against interest does not run afoul of the Confrontation Clause when corroborating circumstances indicate the trustworthiness of a statement. See *United States* v. *Riley*, 657 F.2d 1377, 1383 n.7 (8th Cir. 1981), cert. denied, No. 82-5541 (Jan. 10, 1983); *United States* v. *Palumbo*, 639 F.2d 123, 131 & n.5 (3d Cir.) (Adams, J., concurring), cert. denied, 454 U.S. 819 (1981); *United States* v. *Robinson*, 635 F.2d 363, 364-365 (5th Cir.), cert. denied, 452 U.S. 916 (1981); *United States* v. *Alvarez*, 584 F.2d at 701. Thus, petitioner raises the essentially fact-bound question whether Chrisanthou's responses bore sufficient indicia of reliability.

The court of appeals here correctly concluded (Pet. App. 11a, 12a) that Chrisanthou's responses show numerous indicia of reliability. Chrisanthou knew he was approaching death. He communicated with a friend, not with law enforcement authorities, and there is no evidence that he had an ulterior motive in responding to Vasiliou's inquiries. Chrisanthou was not entirely helpless; the trial court found that he was discriminating in his answers and could respond with a clear "yes" or "no." Contrary to petitioner's suggestion that Chrisanthou shifted the blame to others (Pet. 19-20), his responses instead constituted an admission that he himself was responsible for the fire. If Chrisanthou in fact wanted to shift the blame to others, he presumably would not have denied that the owners of the diner "set him up." Moreover, corroborating circumstances demonstrate

the reliability of Chrisanthou's responses. Mrs. Chrisanthou testified that her husband had received a down payment of $800 and a promise of $3,000 for setting the fire. Chrisanthou's agreement that both owners — Hiotis and petitioner — had paid him for the fire was corroborated by Mrs. Chrisanthou's identification of petitioner as the man with whom her husband met to complete plans for the fire, the testimony that petitioner and Hiotis had asked Karagiannis for the name of an arsonist, the fact that both owners had a financial motive to set fire to the diner, and petitioner's false denial that he had ever seen Chrisanthou and Kynegos.[7] In view of these indicia of reliability, the testimony about Chrisanthou's responses did not violate petitioner's rights under the Confrontation Clause.[8]

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[7]Petitioner urges (Pet. 19, 20-21) that Chrisanthou may have meant to indicate that only Hiotis had paid him for the fire. Of course, petitioner was free to develop this point in cross-examination and in his argument to the jury.

[8]Petitioner's reliance on *Bruton* v. *United States*, 391 U.S. 123 (1968), is misplaced. *Bruton* did not involve any recognized exception to the hearsay rule. Moreover, as a plurality of the Court subsequently noted in *Parker* v. *Randolph*, 442 U.S. 62, 75 n.7 (1979), *Bruton* "was tied to the situation in which it arose: 'where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial' " (quoting 391 U.S. at 135-136).

Petitioner also contends (Pet. 20-21) that admission of Chrisanthou's statements to his wife violated the Confrontation Clause. But, as the court of appeals noted (Pet. App. 16a), Mrs. Chrisanthou's testimony was corroborated by expert testimony of fire and police investigators, by testimony about the financial condition of the diner, by the testimony of Karagiannis, and by the non-hearsay portions of Vasiliou's testimony. Moreover, Chrisanthou lacked a motive to lie to his wife and mentioned the arson to her on several occasions (*ibid.*). The court of appeals also concluded that Chrisanthou's statements to his wife were properly admitted under Fed. R. Evid. 801(d)(2)(E), the co-conspirator exception to the hearsay rule. Under these circumstances, it is clear that admission of the statements did not violate petitioner's rights under the Confrontation Clause. See *Dutton* v. *Evans*, *supra*.

3. Petitioner finally contends (Pet. 21-23) that the reversal of his convictions on the substantive arson counts, on the ground that uncontained gasoline, rather than an explosive, was used to set the fire, compels reversal of his conviction on the conspiracy count as well. The court of appeals correctly rejected this contention.

Petitioner urges that it is "quite possible that the jury's finding of guilt on the conspiracy count was predicated upon the arson rather than the mail fraud" (Pet. 21). To the contrary, we think it clear that the jury must have found petitioner guilty of conspiracy to commit mail fraud. The indictment charged, and the evidence showed, that petitioner and Hiotis planned to burn the diner for the purpose of recovering insurance proceeds. The conspiracy found by the jury must have included the object of mail fraud, since there was no evidence from which the jury could rationally have concluded that the conspiracy extended to the arson, but not the mail fraud. The jury convicted both petitioner and Hiotis on the substantive mail fraud charges on the basis of "clear and convincing evidence" (Pet. App. 7a). In these circumstances, the court of appeals did not err in affirming petitioner's conspiracy conviction. See, *e.g.*, *United States* v. *Mowad*, 641 F.2d 1067, 1073-1074 (2d Cir.), cert. denied, 454 U.S. 817 (1981); *United States* v. *Erickson*, 601 F.2d 296, 303 (7th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Wedelstedt*, 589 F.2d 339, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (2d Cir. 1976).

Petitioner cites *Yates* v. *United States*, 354 U.S. 298 (1957), and *United States* v. *Dansker*, 537 F.2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), in support of his contention that his conspiracy conviction should have been reversed. But in those cases, unlike this one, it was impossible to be sure about which of several objects the jury might

have considered in returning a conviction on the conspiracy count. In *Yates* the Court reversed the conspiracy conviction because the statute of limitations had run with respect to the second object of the conspiracy — organization of the Communist Party — and it was impossible to determine whether the jury had based the conspiracy conviction on that object or on the object of advocacy of violent overthrow of the government. 354 U.S. at 311-312. In *Dansker*, the court concluded that there was some possibility that the jury had found a conspiracy that did not encompass the substantive offense of which the defendant had been convicted. 537 F.2d at 51.[9]

To the extent *United States* v. *Dansker* suggests that a multiple objective conspiracy conviction must always be reversed whenever one or more convictions on the substantive counts that are objects of the conspiracy are reversed, a conflict among the circuits may exist. See also *United States* v. *Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977); *United States* v. *Carman*, 577 F.2d 556, 566-568 (9th Cir. 1978); *Van Liew* v. *United States*, 321 F.2d 664, 672 (5th Cir.

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[9]The other cases cited by petitioner are similarly distinguishable. In *Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931), the Court concluded that a conviction must be reversed if one of the three clauses in a state criminal statute were found invalid and "it is impossible to say under which clause of the statute the conviction was obtained" (*id.* at 368). In *United States* v. *Kavazanjian*, 623 F.2d 730, 739 (1st Cir. 1980), the court stated that it was "impossible to conclude" that a conspiracy conviction was not based on a substantive charge that failed to state a crime. See also *United States* v. *Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978), cert. dismissed, 444 U.S. 1040 (1980) (jury could have based its conspiracy verdict solely on a finding that there was a conspiracy to violate a statute on which it was erroneously instructed); *United States* v. *Baranski*, 484 F.2d 556, 559-561 (7th Cir. 1973) (court could not say with any certainty which of the three objects was crucial to the jury's determination that defendants were guilty of conspiracy; defendants had been acquitted on all substantive counts).

1963). But the more recent decision of *United States* v. *Schoenhut*, 576 F.2d 1010, 1026-1028 (3d Cir.), cert. denied, 439 U.S. 964 (1978), suggests that the holding of *Dansker* probably should not be read so broadly; it is therefore unclear whether any conflict exists at the present time. Moreover, *Dansker* and the other cases cited by petitioner involve conspiracies that involved factually distinct object offenses and that could plausibly have extended to fewer than all of the objects alleged. It is by no means clear that the Third Circuit would apply its holding in *Dansker* to the circumstances of this case, in which there is an inextricable relationship among the various objects of the conspiracy. Thus, to the extent there may be disagreement among the circuits, this case would not present an appropriate vehicle for its resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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